

Barnard & Burk and its workers' compensation insurance carrier, National Union Fire Insurance (referred to jointly as "Barnard" hereafter), ask the Appeals Board of the Utah Labor Commission to reconsider its prior determination awarding benefits to Johnny A. under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this matter pursuant to Utah Code Ann. §63-46b-13.

BACKGROUND AND ISSUE PRESENTED

Judge La Jeunesse ordered Barnard to pay permanent partial disability compensation and medical expenses arising from a back injury Mr. A. suffered at Barnard on January 21, 1991. Barnard then sought Appeals Board review of Judge La Jeunesse's decision on the grounds that Mr. A.'s claim for medical expenses is barred by §417(1) of the Act and his claim for permanent partial disability compensation is barred by § 417(2) of the Act. In response, Mr. A. argued that, because Barnard failed to raise its §417 defenses in its answer to Mr. A.'s claim, Barnard waived those defenses.

In its decision issued May 3, 2004, the Appeals Board concluded that Barnard had waived its §417 defenses. The Appeals Board therefore affirmed Judge La Jeunesse's award of benefits to Mr. A.. Barnard now asks the Appeals Board to reconsider its decision. Barnard argues that it: 1) was under no obligation to raise its §417(1) defense in its answer to Mr. A.'s claim; and 2) did, in fact, adequately raise its §417 defenses.

DISCUSSION

Barnard's obligation to raise its §417(1) defense. Section § 417(1) of the Act contains the following restriction to an injured worker's right to receive medical treatment for work-related injuries (emphasis added):

(1) Except with respect to prosthetic devices, **in nonpermanent total disability cases** an employee's medical benefit entitlement ceases if for a period of three consecutive years the employee does not:

- (a) incur medical expenses reasonably related to the industrial accident; and
- (b) submit the medical expenses incurred to the employee's employer or insurance carrier for payment.

Barnard argues that it was not required to raise the foregoing statute's three year "incur and submit" requirement as a defense in its answer to Mr. A.'s claim because the defense only applies to

“nonpermanent total disability cases,” and at the time Barnard filed its answer, Mr. A.’s claim was for **permanent** total disability.

As a preliminary matter, the Appeals Board notes that Barnard failed to raise this issue in its original motion for review. Section 63-46b-12(1)(b) of the Utah Administrative Procedures Act requires a party seeking agency review to “state the grounds for review.” This requirement is necessary to avoid piecemeal review proceedings. Because Barnard failed to raise this issue as a grounds for review in its initial motion for review, the Appeals Board declines to consider the issue for the first time as part of this reconsideration proceeding.

But even if the Appeals Board were to consider the merits of Barnard’s new argument, the Appeals Board would reject that argument. Mr. A.’s application for hearing made a claim for both permanent total disability compensation and medical benefits. The claim for medical benefits was not dependent upon the claim for permanent total disability compensation. It was therefore Barnard’s obligation to raise in its answer all its defenses to the medical claim, including its §417(1) defense.

Sufficiency of Barnard’s §417 defenses. Having concluded that Barnard was required to raise its §417 defenses in its answer to Mr. A.’s claim, the Appeals Board must consider whether Barnard did so. Barnard’s answer contained only vague and tentative references to statutes of limitation and notice provisions that might be found somewhere in the Workers’ Compensation Act or Occupational Disease Act. Barnard’s answer did not “state all affirmative defenses with sufficient accuracy and detail that an applicant may be fully informed of the nature of the defense asserted,” as required by the Commission’s Rule 602-2-1.D.

Barnard argues that even if its answer was not sufficient under the Commission’s Rule 602-2-1.D to preserve its §417 defenses, its answer was sufficient under the Utah Rules of Civil Procedure and appellate precedent interpreting those rules. However, it is the Commission’s rules that govern adjudicative process before the Commission. Consequently, the Appeals Board looks to the Commission’s Rule R602-2-1.D, rather than the Utah Rules of Civil Procedure, to evaluate the sufficiency of Barnard’s answer.

For the reasons already discussed in this decision and in the Appeals Board’s previous decision, the Appeals Board concludes that Barnard’s answer did not raise its §417 defenses and that those defenses were, therefore, waived.

ORDER

The Commission reaffirms its previous decision and denies Barnard’s request for reconsideration. It is so ordered.

Dated this 18th day of October, 2004.

Colleen Colton, Chair
Patricia S. Drawe
Joseph E. Hatch

